

The Protected Groups under the Genocide Convention

An analysis of developments in the jurisprudence of the ICTR
relevant to the interpretation of the protected groups

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1. Introduction

1.1 Topic

The purpose of this thesis is to discuss the contribution that the case law of the UN International Criminal Tribunal for Rwanda (hereafter the “ICTR”) has given to the interpretation of the protected groups in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948¹ (hereafter the “Genocide Convention” or the “Convention”) including the scope of these protected groups. Of the four protected groups set out in Article II; *national, ethnical, racial and religious*, the main focus in this thesis will be on ethnic group as this is the most relevant protected group in the ICTR’s jurisprudence. Several questions can be asked regarding these issues; what did the Convention drafters mean by protected group? What are the criteria for belonging to a group protected by the Convention? Further, is there any objective test for identifying such groups?

When the ICTR was established in 1994,² Art. II of the Convention was adopted *mutatis mutandis* in the Statute of the ICTR Art. 2³. The same provision was also adopted in the Statute of the UN International Criminal Tribunal for the former Yugoslavia (hereafter the “ICTY”) and in the Statute of the International Criminal Court (hereafter the “ICC”). This implies that the jurisprudence of these the ICTR (in addition to the ICTY and the ICC) can be considered as contributions to the interpretation of the definition of

¹ The Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948. Entered into force on 12 January 1951

² Security Council Resolution 955 of 8 November 1994

³ The Statute is available at www.icttr.org/ENGLISH/basicdocs/statute.html

genocide. However, it is to be noted that the ICTR does not have a formal role of interpreting the Genocide Convention as opposed to for example the European Court of Human Rights⁴ that is a mechanism set up by the Convention for the Protection of Human Rights and Fundamental Freedoms⁵ in order to ensure the enforcement in the Convention's obligations. The Genocide Convention and the ICTR are two separate legal instruments and the ICTR has thus no formal competence set out in the Convention as regards to the interpretation of the Genocide Convention.

The concept of protected groups is of vital importance in order to establish whether genocide has taken place. If the targeted group is not within the definition and scope of a protected group under the Genocide Convention, genocide can not legally be established. Thus, the determination of whether a group is protected or not, is essential in the process of establishing whether genocide has occurred. Article II of the Genocide Convention reads;

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;*
- b) Causing serious bodily or mental harm to members of the group;*
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- d) Imposing measures intended to prevent births within the group;*
- e) Forcibly transferring children of the group to another group.”*

⁴ The European Court of Human Rights, cf. the Convention for the Protection of Human Rights. Set up in 1959

⁵ The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950

The Genocide Convention and corresponding customary international rules require both objective and subjective elements for individual criminal responsibility for genocide to arise. The objective element has two aspects; first, it is related to the prohibited five acts. The second aspect of the objective element relates to the targeted group. The group has to be national, racial, ethnical or religious. Moreover, the subjective element (*mens rea*) must be present. To convict a person of genocide, the provision that the perpetrator has to have an intention to destroy the victim group must be fulfilled⁶ and the protected groups is an element of the special intent which is required in order to constitute genocide.⁷

Our time has been named the century of genocide.⁸ Rwanda, Bosnia, Sierra Leone, the Armenian genocide and the Holocaust are all examples of unthinkable atrocities. In 1994 about 800,000⁹ Tutsi and moderate Hutu were killed in Rwanda. In September 1998 the ICTR, in the *Akayesu-case*¹⁰, delivered the first-ever judgement on the crime of genocide by an international court. The ICTR has handed down 17 judgements involving 23 accused, where of them has been acquitted. Another 25 accused are currently on trial¹¹.

In the following, I shall first present the background of the Genocide Convention, and thereafter give an overview of the legal context, *i.e* give an outline of the legal situation

⁶ Antonio Cassese, *International Criminal Law*, p.96, Oxford University Press, 2003, pp.98-105

⁷ The special intent that is required has the character of subjective surplus

⁸ Roger Smith; *State Power and Genocidal Intent: on the Uses of Genocide in the Twentieth Century*” in Chorbajian&Shirinian (red.), 1999, p.3

⁹ The numbers vary, and the exact number of lives lost will never be known. This number is based on Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report 1999 p.15. Another researcher, Filip Reyntjens in “*Estimation du nombre de personnes tuées au Rwanda en 1994*” in *L’Afrique des Grands Lacs: Annuaire 1996-97*, Paris, p. 182 estimated that over a million lost their lives in Rwanda in 1994, some 600.000 of these were Tutsi and 500.00 were Hutu.

¹⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998

¹¹ Cf. www.ictor.org and www.trial-ch.org

prior to the ICTR. The purpose is not to give an exhaustive of all contributions in the discussion of the protected groups but a kind of *status quo* prior to the ICTR as far as possible. Then I will analyse the ICTR's interpretation of protected groups under Art. II of the Genocide Convention, and their scope. As mentioned above, the emphasis will be on ethnic groups. For the purpose of comparison I will also touch upon relevant judgements given by the ICTY. Finally, under Chapter 5, I will try to summarise and draw some conclusions on the developments by the ICTR on protected groups.

2. The Genocide Convention – general background

2.1 The development of the term genocide and the adoption of the Convention

The crime of genocide was initially only a sub-category of crimes against humanity, thus neither Art. 6 of the Charter of the International Military Tribunal for the Major War Criminals (Nuremberg) nor Art. II (1) of Control Council Law no.10,¹² did explicitly envisage genocide as a separate category of these crimes. It has, however, been held that the wording of the mentioned provisions shows that those crimes encompassed genocide.¹³ Moreover, genocide was explicitly discussed in the Polish Supreme Court judgement, known as the *Hoess-case*¹⁴. Genocide was also discussed in the *Greifelt-case* decided in 1948 by a US Military Tribunal.¹⁵

¹² The Control Council Law no. 10 was “multinational” legislation, passed by the four victorious Powers four months after the London Agreement, on 20 December 1945

¹³ Antonio Cassese, *International Criminal Law*, p.96, 2003

¹⁴ *Poland v. Hoess* (1948) 7 LRTWC 11 (Supreme National Tribunal of Poland). Hoess, a Nazi commandant at Auschwitz was sentenced to death by a Polish national tribunal.

¹⁵ *United States v. Greifelt et al.* (1948) 13 LRTWC 1 (United States Military Tribunal), p.17

The term “genocide” is relatively new, but today a widely spread and common term. It is very much contested and some would say rather overused.¹⁶ Winston Churchill once called genocide “*the crime without a name*”.¹⁷ The concept genocide was a direct response to the Holocaust and the atrocities during World War II.¹⁸ The term is rooted in two related sources: First, Raphael Lemkin, a Polish-American scholar in international criminal law, invented the word in 1943 as he tried to define the Nazis’ atrocities against the Jews.¹⁹ He created the term from two words; *genos*, which means race, nation or tribe in ancient Greek and *caedere*, which means to kill in Latin. Moreover, in 1944, Lemkin defined genocide as “*a coordinated plan of different actions aiming at the destruction of essential foundations of the life of a national group, with the aim of annihilating the groups themselves*”.²⁰

During and after World War II, Lemkin was a driving force in the work for an international codification of the crime of genocide.²¹ In 1948 the United Nations (hereafter the “UN”) codified the crime of genocide in the Genocide Convention²² and it thus gained autonomous significance as a specific crime. The Genocide Convention was the end of Raphael Lemkin’s long struggle and lobbying for codifying genocide as an international crime.²³ It was adopted by the UN General Assembly on 9 December 1948,²⁴ it entered into force in January 1951 and today it has 136 state parties.²⁵ This

¹⁶ See Eric D. Weitz , *A century of genocide*, p.8, Princeton University Press 2003

¹⁷ Cf. Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, Yale University Press 1981

¹⁸ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 1, p.396

¹⁹ Eric D. Weitz , *A century of genocide*, p.8, Princeton University Press 2003

²⁰ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, 1944, p.79

²¹ Eric Markusen; *Hvad er folkemord – en søgen efter svar*. Published in *Folkemord.Den jyske historiker nr.90/2000*, p.5. Available at www.dchf.dk/publications_dk/den_jyske_hist/markusen_djh.html

²² (1951) 78 UNTS 277

²³ Eric Markusen; *Hvad er folkemord – en søgen efter svar*. Published in *Folkemord.Den jyske historiker nr.90/2000*, p.5

²⁴ (1951) 78 UNTS 277

was a major step forward and the establishment of the Convention signalled that there were actually limits for state-sponsored atrocities and that impunity could not be tolerated.²⁶ The drafting of the Genocide Convention was thus considered as an important advance in international law. First, the sole existence of the Convention is in itself very important. Secondly, it sets out a definition of the crime of genocide (Art. II). Moreover, it punishes other acts connected to genocide, such as conspiracy, complicity etc. (Art. III). It prohibits genocide regardless of whether it is perpetrated in wartime or in time of peace (Art. IV). Furthermore, the Convention considers genocide as both a crime which involve the individual criminal responsibility of the perpetrator and as an international offence entailing the responsibility of the State, whose authorities engage (or participate) in the genocide.

The Genocide Convention was the first of several international treaties making the basis for the modern system of fundamental rights and freedoms. However, despite the drafters of the Genocide Convention's goal to "*liberate mankind from such an odious scourge*,"²⁷ genocide continued to take place for the next decades (e.g. the former Yugoslavia and Rwanda). It was first when the Convention's definition of genocide was copied in the Statutes of the ICTY (1993) and the ICTR (1994) that the Genocide Convention was applied in an actual court case.²⁸ Up and until today, both the ICTY and the ICTR have given judgements in a series of cases against persons charged with genocide.

²⁵ See The office of the United Nations High Commissioner for Human Rights, web site: <http://www.ohchr.org/english/countries/ratification/1.htm>

²⁶ William Schabas; *The genocide Convention at Fifty*, Special report 41. Available at www.usip.org

²⁷ Paragraph 3 of the Preamble of the Genocide Convention

²⁸ The first judgement on genocide based on the Genocide Convention and given by an international tribunal was the conviction of Jean-Paul Akayesu by the ICTR on 2 September 1998, ICTR-96-4-T

2.2 Article II of the Genocide Convention

In Article II of the Convention its four protected groups are listed. This article has been called “the heart of the Convention,”²⁹ and defines genocide as the intentional destruction of one of the four protected groups by killing or causing seriously bodily or mental harm to members of a group, inflicting conditions of life calculated to bring about the group’s physical destruction in whole or in part, imposing measures intending to prevent births within the group, or with force transferring children from one group to another. A common short version of the definition is “*the intentional killing, destruction, or extermination of groups or members of a group as such*”.³⁰

2.3 The status of the Crime of Genocide as International Customary law

Beyond the Convention the prohibition of genocide also forms part of customary international law.³¹ In the *Bagilishema-case*³², the ICTR stated that “*the Genocide Convention is undeniably considered part of customary international law, as reflected in the advisory opinion of the International Court of Justice (1951) on reservations to the Convention*”.³³ In the *Kayishema and Ruzindana-case*³⁴ the ICTR Trial Chamber

²⁹ Cf. William A. Schabas, *Genocide in International Law*, p.72, Cambridge University Press, 2000

³⁰ Cf. Antonio Cassese, *International Criminal Law*, p.96, Oxford University Press, 2003

³¹ Cf. Andreas Zimmermann, *Prosecuting the Crime of Genocide: The Role of National Courts, International Criminal Tribunals and the International Court of Justice*, Mennesker og Rettigheter nr.2, 2003

³² *Prosecutor v. Bagilishema*, Case No. ICTR-95-IA-T, Judgement of 7 June 2001. Ignace Bagilishema was the bourgmestre of Mabanza. He was acquitted by the ICTR and the acquittal was confirmed by the Appeals Chamber in July 2002

³³ *Prosecutor v. Bagilishema*, Case No. ICTR-95-IA-T, Judgement of 7 June 2001, para.54.

³⁴ *Prosecutor v. Kayishema and Ruzindana*. Case No, ICTR-95-1-T, 21 May 1999, para.88. Clément Kayishema, a medical doctor from Kibuye, where he was Prefect of Kibuye. He was found guilty of genocide by the ICTR and sentenced to life imprisonment. His appeal was dismissed on 1 June 2001 and he now serves his sentence in Mali. Obed Ruzindana, a Businessman in Kibuye, was found guilty of

stated that the crime of genocide is considered a part of international customary law and moreover a norm of *jus cogens*.³⁵ This was confirmed by the ICTY which stated in the *Krstic-case*³⁶ that despite being adopted during the same period the term genocide itself was coined, the Genocide Convention has been viewed as codifying a norm of international law long recognized and which case-law would soon elevate to the level of a peremptory norm of general international law; *jus cogens*.³⁷ Consequently, it may be said that genocide is prohibited in all states, also in those states which have not adopted the Convention.

3. Legal Context

3.1 The prohibited groups - general

The Genocide Convention does not protect all kind of groups. The groups protected are, as above mentioned, the following; *national, ethnical, racial and religious*. However,

genocide and sentenced to 25 years imprisonment. His appeal was dismissed on 1 June 2001 and he is today imprisoned in Mali.

³⁵ Jus cogens can be defined as “compelling” or “higher” law that transcends the limitations of national laws and which no country can violate with impunity

³⁶ *Prosecutor v. Radislav Krstic, IT-98-33, 2 August 2001*. Radislav Krstic was a general of the Drina Corps of the Army of the Serb Republic of Bosnia-Herzegovina/Republika Srpska. He was convicted of genocide, violations of the laws or customs of war, and crimes against humanity, and sentenced to 46 years imprisonment. However, on 4 April 2004, the Appeals Chamber in its judgement confirmed the finding that acts of genocide had taken place in Srebrenica. It nevertheless held that Krstic was a mere accomplice to genocide. According to the judgment, the latter's participation consisted in aiding and abetting acts of genocide rather than instigating such acts. According to the Appeals Chamber, Krstic knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. It added that “although the evidence suggests that Radislav Krstic was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources”. The Appeals Chamber sentenced Krstic to 35 years imprisonment. He serves his sentence in Great Britain.

³⁷ *Prosecutor v. Krstic, IT-98-33, 2 August 2001, para.541*

these four groups are not clearly defined in the Convention, neither elsewhere. It has been pointed out that the four concepts are in themselves imprecise.³⁸

The use of concepts of protected groups and national minorities partially overlap and are in some cases synonymous in the work on the protection of minorities by international bodies. In some European instruments, as for example the European Convention on Human Rights (Art.14), the term “national minorities” is used. Other international instruments more commonly refer to “ethnic, religious or linguistic minorities.”³⁹ Moreover, the preparatory work on the Genocide Convention also reflects that the term “ethnic” was added at a later stage in order to better define the type of the protected groups and ensure that the term “national” would not be understood as encompassing purely political groups.⁴⁰

Scholars soon found reasons to criticise the definition of what constitutes a protected group, together with other aspects of the Convention. The Convention was, after all, a result of compromise between the different states (at the time the UN had only fifty-eight member states) that was participating in the discussions leading to its wording and several analysts have argued that the Convention’s definition of genocide in the end became more restrictive than Raphael Lemkin’s definition.⁴¹ It has been pointed out

³⁸ See *Genocide in International Law*, William A. Schabas, Cambridge University Press, 2000, p.110

³⁹ Cf. the International Covenant on Civil and Political Rights: “In those States in which *ethnic, religious or linguistic minorities* exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”

⁴⁰ Cf. UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden)

⁴¹ Lori Brun; *Beyond the 1948 Genocide Convention: Emerging Principles of Genocide in International Law*, Maryland Journal of International Law and Trade, Vol.17, p.197 (1993)

that some states wanted to narrow the Convention's definitional parameters of genocide. This was necessary to exclude many of their own current, as well as past, policies.⁴²

It has been claimed that the Genocide Convention is both too broad and too narrow, besides being poorly and unclear written, and it is said that nearly everyone considers the Convention to be insufficient for one reason or another.⁴³

A main issue in criticism against the Genocide Convention has been the exclusion of political groups, and the fact that it does not embrace groups defined by their class background. Furthermore, the Convention does not include cultural genocide. It has been claimed that the definition of the protected groups represents the Convention's gravest weakness; "*The major problem with the Convention is its narrow definition of what constitutes a victim group... .*"⁴⁴ Leo Kuper stated that "*I believe a major omission to be in the exclusion of political groups from the list of groups protected*".⁴⁵

During the negotiations leading to the Genocide Convention the issue of which groups that were to be included was difficult.⁴⁶ It was argued that the elimination of a political group may not fit with the notion of genocide and that cultural genocide would also lead to problems. Thus, political, cultural and economic genocide were not included in the Convention. Consequently, the Convention concentrates on the protection of groups that one "involuntarily" belongs to.⁴⁷

⁴² Ward Churchill, *A little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the present*, 1997, p. 410

⁴³ Eric D. Weitz, *A century of genocide*, p.9, Princeton University Press 2003

⁴⁴ Frank Chalk and Kurt Jonassohn; *The History and Sociology of Genocide: Analyses and Case Studies*, 1990, p.11

⁴⁵ Leo Kuper; *Genocide: Its Political Use in the Twentieth Century*. New Haven, 1981, p.39

⁴⁶ Antonio Cassese, *International Criminal Law*, p.96, Oxford University Press, 2003 and Eric D. Weitz, *A century of genocide*, p.8, Princeton University Press 2003

⁴⁷ Antonio Cassese, *International Criminal Law*, p.97, Oxford University Press, 2003

As political and social groups are often the targets of severe political violence this narrow definition of protected groups has been widely criticized. The elements of legal definition lead to many difficult questions and it has been argued that several of the elements in fact run counter to general moral understandings of the term. An example is that one might have a case of genocide involving a few casualties or a situation of extreme brutality that does not meet the definition (for example mass murder of political groups). Frank Chalk and Kurt Jonassohn argue in *The History and Sociology of Genocide*⁴⁸ that the Convention's main problem is its narrow definition of what constitutes a protected group. Leo Kuper's comment to this is that "*many nations were unwilling to renounce the right to commit political genocide against their own nationals*".⁴⁹

The first two drafts of the Convention originally included political groups, but several UN member states were against it (amongst them the Soviet Union)⁵⁰ and political groups were removed from the Convention in the final draft. In a report on the Genocide Convention published in 1985, Benjamin Whitaker stated that "*(...) leaving political or other groups beyond the purported protection of the Convention offers a wide and dangerous loophole which permits any designated group to be exterminated, ostensibly under the excuse that it is for political reasons*".⁵¹

It has been claimed that the Genocide Convention on one side protects group members from life-threatening situations on the basis of certain involuntary or immutable

⁴⁸ Frank Chalk and Kurt Jonassohn; *The History and Sociology of Genocide: Analyses and Case Studies*, 1990, p.11

⁴⁹ Leo Kuper; *Genocide: Its Political Use in the Twentieth Century*. New Haven, 1981, p.29

⁵⁰ William A. Schabas, *Genocide in International Law*, 2000, p.140

⁵¹ Benjamin Whitaker; *revised and Updated report on the Question of the Prevention and Punishment of the Crime of Genocide*, New York, United Nations (Doc. E/CN.4/Sub.2/1985/6, p.19, para.36

characteristics, for example the ethnic community into which a person is born. On the other hand, to the extent that the Convention endorses a vision of a community life based on a group division, it does so only with respect to those groups listed in the Convention's Art. II and only with respect to certain types of physical attacks. Thus, it has been claimed that if three equal brutal schemes were carried out, one based on random terror, another targeted against political opponents or another social class, and the third carried out against a "national, ethnical, racial or religious group", then only the third would actually constitute genocide according to Art.II of the Genocide Convention.⁵²

As a response to these problems, scholars have suggested different interpretations which cover most forms of state-sponsored mass killing. Leo Kuper for example suggests a broader understanding of the crime in order to tackle problems arising from the Convention's technical language. It has also been suggested to use new terms as *democide* (R.J. Rummel) referring to all types of mass state murder.⁵³

Regarding cultural genocide, it has been pointed out that the essence of genocide is the deliberate destruction of a human group.⁵⁴ It has further been argued that such destruction may be the case by the disintegration of the political and social institutions, of culture, languages, national feelings, religion and the economic existence and not only by killing the members of the group⁵⁵. It has been called cultural genocide when the goal of the acts is the destruction of a group by elimination of its cultural attributes, as opposed to the physical destruction of the group.⁵⁶ Cultural genocide (as well as

⁵² Lori Fisler Damrosch, *Genocide and Ethnic Conflict*, published in *International Law and Ethnic Conflict* edited by David Wippman, 1998, p.261

⁵³ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 1, p.396

⁵⁴ Lemkin; *Axis Rule in Occupied Europe*, 1944, p.79

⁵⁵ The ICTY has confirmed that "to destroy" refers not only to the physical destruction of a group; see the *Krstic-judgement*, para.574

⁵⁶ Lemkin; *Axis Rule in Occupied Europe*, 1944, p.79

political genocide; see above) was included in the first two drafts of the Genocide Convention, but removed from the final draft.⁵⁷

3.2 Constituting genocide: Objective and subjective elements

The crime of genocide is composed of three elements: Acts, intent and victim group. It is the questions regarding victim group that is the main issue in this thesis. Acts and intent will therefore only very briefly be discussed.

As mentioned in the introduction, the Genocide Convention and corresponding customary international rules require both objective and subjective elements in order to constitute genocide. The objective element's two aspects; first, relating to the prohibited five acts and secondly the aspect of the objective element relating to the targeted group. The group has to be national, racial, ethnical or religious. The major issues regarding the objective side of genocide relate to the notion of the protected group of the crime and the identification of the four groups. Moreover, the subjective element (*mens rea*) must be materialized. To convict a person of genocide, the perpetrator must have the required intent. In its commentary on the 1996 Code of Crimes against the Peace and Security of Mankind, the International Law Commission qualifies genocide's special intent as "*the distinguishing characteristics of this particular crime under international law*".⁵⁸ The subjective element is also two-folded. First, the perpetrator must have criminal intent for the underlying offence. Furthermore, the perpetrator must have the

⁵⁷ Martin Mennecke and Eric Markusen; *The international Criminal Tribunal for the former Yugoslavia and the Crime of Genocide* p. 301, I: *Genocide, Comparisons and Contemporary Debates*. Danish Genocide Studies Series 2, 2003, Edited by Mette B. Jensen and Steven L. B. Jensen

⁵⁸ CF. Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May-26 July 1996, UN Doc. A/51/10, p.94

intent to destroy, in whole or in part, the group as such (*dolus specialis*).⁵⁹ However, the question of intent falls outside the scope of this thesis and will therefore not be discussed in further detail. It is the objective element of genocide which will be discussed here and the main focus is on the “ethnic group”-requirement.

3.3 The status of the Convention prior to the establishment of the ICTR regarding the protected groups

Through the years scholars have regularly proposed amendments or tried to interpret the Genocide Convention in perhaps an unrealistic or exaggerated manner. In the end, however, the wording of the Convention has not been altered. During the 1970s and 1980s it was questioned whether the Convention in fact was a historical curiosity. In 1990 Frank Chalk and Kurt Jonassohn stated in *The History and Sociology of Genocide. Analyses and Case studies*, that the Genocide Convention “*although it marked a milestone in international law, the UN definition is of little use to scholars*”. However, in the 1990s, after the atrocities committed in Bosnia and Rwanda, the Convention got its revival when the definition in the Genocide Convention was used in the statutes of both the ICTR (Art. 2) and ICTY (Art.7) as well as in the Statute of the International Criminal Court (the “ICC) Art.6. Thus, it seems clear that despite its shortcomings, the Convention remains the fundamental component of the current legal protection of human rights.⁶⁰

⁵⁹ Intent is a controversial element of the crime of genocide and is often discussed as a major limitation to successful prosecutions, cf. Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 1, p.396

⁶⁰ William A. Schabas, *Genocide in International Law*, p.8, 2000

3.4 Generally on groups and categories – racial and ethnic groups, nationality

There are different ways of categorizing different groups of human beings; e.g race, nationality and ethnicity. The habit of categorizing one self, as well as others, is deeply rooted in the human nature. It has even been claimed that categorization is a fundamental characteristic of our mental processes and probably can not be changed.⁶¹

Ethnicity can be based on different features linking people together. Those features can be a common language, religion, social rituals and a feeling of togetherness. The American scholar Donald L. Horowitzs states that a feeling of togetherness is a “*strong sense of similarity, with roots in perceived genetic affinity or early socialization, or both*”.⁶² The bond that members of an ethnic group share is often developed and intensified if there is a history of being victimized by other groups.⁶³ The feeling of belonging to a certain group gets stronger if the group is stigmatised or harassed. This may be the case in Rwanda, where the Hutu through years felt discriminated against by the Tutsi elite. After the Hutu revolution in the late 1950s, it was the Tutsi that got the role as victims. A substantial number fled the country and the group as a whole felt targeted. The changing power conditions in Rwanda, where the two groups dominated in different periods, is likely to have developed the two groups’ feeling of togetherness and sharing a common fate and first and foremost making the ethnic awareness very clear. In a pre-genocidal period, there is a tendency among the potential perpetrators to refer to other human beings in terms of their group membership rather than as individuals. Furthermore, potential perpetrators will create an emotion of the other

⁶¹ Afflitto, Frank M. and Vandiver, Margaret; *The Political Determinants of Ethnic Genocide* in *Anatomy of Genocide* (edited by Alexandre Kimenyi and Otis L. Scott)

⁶² Horowitz, Donald L., *The Deadly Ethnic Riot*, p.47, Berkeley: University of California Press, 2001

⁶³ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 1, p.304

group being a threat to the perpetrators' security or identity. This emotion has been labelled "negative ethos" which strengthens the sense of identity and "*mutual belonging among ethnonationalist group members.*"⁶⁴ Such emotions are also used in order to emphasize and recall earlier oppression and persecution and creates an atmosphere of mistrust and hostility. This is an easy situation to exploit and misuse for political leaders to promote own agendas and policies.⁶⁵

It has also been pointed out that the categories "race" and "nation" are not self-evident. They are not natural, timeless ways of understanding human variety and of organizing political and social systems. The term "race" originated in the late fourteenth century and was first used prevalently in the sixteenth century. Moreover, "nation" (from latin; *natio*) originally simply meant a group of people and was used to describe all kinds of groups (collectives).⁶⁶ This may lead to a thought that "ethnic groups" are not self-evident or timeless concepts.

Members of an ethnic group typically share a sense of commonality. This sense of sharing features or attributes often have its beginning in a myth of common origins (e.g the Israelis as descendants from Abraham). It is reckoned that ethnicity is the most flexible and permeable form of identity. People belonging to other ethnic groups are normally able to assimilate into the ethnic group through marriage or acculturation. However, an ethnic group develops into a nation when it becomes politicised and a political order is established.⁶⁷

⁶⁴ Rotchild, Donald and Groth, Alexander J.: *Pathological dimensions of domestic and international ethnicity*, Political Science Quarterly, 1995 110:69-82

⁶⁵ Afflitto, Frank M. and Vandiver, Margaret; *The Political Determinants of Ethnic Genocide* in *Anatomy of Genocide* (edited by Alexandre Kimenyi and Otis L. Scott)

⁶⁶ See Eric D. Weitz; *A century of genocide*, Princeton University Press 2003, p.17

⁶⁷ See Eric D. Weitz ; *A century of genocide*, 2003, p.21

Race is considered the most exclusive and closed category of identity.⁶⁸ “Race” is defined as “*each of the major divisions of humankind having distinct physical characteristics*”⁶⁹. It has further been described as a category of individuals who are distinguished by common and constant, and therefore hereditary, features.⁷⁰ This can be contrasted to ethnic groups which are more permeable (cf. above). In the US, the genocide legislation defines “racial group” as “*a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent*”⁷¹. Moreover, it is held that distinguishing between “ethnicity” and “racial” is rather difficult. It has been argued that the preferable solution is to take the two concepts together to cover relevant cases “*rather than attempting to distinguish between the two so that unfortunate gaps appear.*”⁷²

However, a general discomfort with the term “race” and the associations it gives (cf. the theories and ideologies that grew out of the work of nineteenth century anthropologists and physiologists) has made it less used.

⁶⁸ See Eric D. Weitz ; *A century of genocide*, 2003, p.21

⁶⁹ Cf. *Concise Oxford English Dictionary*, Eleventh Edition, Oxford University Press

⁷⁰ See *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, Benjamin Whitaker, UN Doc. E/CN.4/Sub.2/1985/6 pp.15-16

⁷¹ Cf. Genocide Convention Implementation Act of 1987

⁷² Shaw, Malcolm; *Genocide and International Law*, in Yoram Dinstein (ed); *International Law at a Time of perplexity (Essays in Honour of Shabtai Rosenne)*, 1989;., p.807

4. Factual context

4.1 Theories of Ethnicity in Rwanda - background and brief history

4.1.1 Introduction

Rwanda's history is crucial to understand the relations between the different ethnic group and thus the reasons for the tensions between the Hutu and the Tutsi. There have been many interpretations and theories concerning Rwanda's complex history. The US historian Alison Des Forges claims that *"beneath the individual motivations lay a common fear rooted in firmly held but mistaken ideas of the Rwandan past. Organizers of the genocide who had themselves grown up with these distortions of history, skilfully exploited misconceptions about who the Tutsi were, where they had come from, and what they had done in the past. From these elements, they fuelled the fear and hatred that made genocide imaginable"*.⁷³

4.1.2 Hutu, Tutsi and Twa

There are about 8 million inhabitants in Rwanda. Out of these, 3% is Twa, 12% are Tutsi and 84% of the population is Hutu.⁷⁴

⁷³ Cf. Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report 1999

⁷⁴ Cf. The Norwegian Helsinki Committee; www.nhc.no

After the genocide Rwandans have in the reconciliation process tried to put the ethnic diversities behind them and official statistics on ethnicity does not exist.⁷⁵

The origin of ethnic identity in Rwanda remains a subject of major controversy. It seems to be widely accepted that the designations Hutu, Tutsi and Twa existed in the pre-colonial Rwandan state (prior to 1895). However, the exact historic and demographic meanings of these designations have been disputed.⁷⁶

One theory is that the forefathers of the Hutu and the Tutsi came to the Rwanda region over a period of two thousand years. A language, Kinyarwanda, and a common culture of song, dance and poetry were developed. A foundation of religious and philosophical ideas was also created.⁷⁷ As Rwanda developed into a major state in the eighteenth century, people's wealth was measured in the number of cattle. Steadily, an elite developed. The term "Tutsi" was first used describing a person who was rich in cattle. However, soon it became a term used to describe the elite group in general. On the other hand, "Hutu" was used to describe the mass of ordinary people. In this period, the terms "Hutu" and "Tutsi" referred to individuals rather than to groups. The distinction between the two groups was based on lineage rather than ethnicity. It was possible to move from one status to another through growth in wealth or through marriage.⁷⁸

Another theory is that the hunting and gathering Twa were the first, and original, inhabitants of the territory. Then they were overrun and dominated by Hutu agriculturalists. According to this theory, the Hutu is supposed to have arrived in the

⁷⁵ Sylo Taraku and Gunnar M. Karlsen (ed.); Report II/2002, The Norwegian Helsinki Committee

⁷⁶ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.925

⁷⁷ Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report

⁷⁸ Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report (History, p.1-2)

region from the western regions of Africa approximately two thousand years ago. Tutsi cattle herders are alleged to have conquered the territory about five hundred years ago. The theory holds that the Tutsi, despite their inferior numbers, soon established authority over the Hutu and the Twa. Thus, the hatred that generated the genocide was a consequence of the resentment that was created by the Tutsi occupation and subjugation in this period. This theory dominated the view on Rwanda's history for many decades, but has today been discredited by most scholars.⁷⁹

However, in recent research, two other theories have dominated. Both theories maintain that ethnicity is a social construction that is fluid and that determination of ethnicity can not be based on physical characteristics. However, the two theories have different views on the question on what time ethnicity in Rwanda got its modern form. One theory is that in pre-colonial Rwanda, Hutu, Tutsi and Twa were categories that derived from work related activity and had actually small social significance, as the groups shared a common language, culture and lived together throughout the country. Then, colonial policies subsequently transformed these categories into ethnic groups. This theory is supported by some scholars and many current Rwandan politicians.⁸⁰

The supporters of the second theory argue that the terms Hutu, Tutsi and Twa conferred status and were freighted with status difference even before the colonial period. In the mid 1800s the central court of Rwanda (which was then a monarchy) used categorization of the population in order to extend its control. Tutsi were placed in marginal areas as the court's representatives. Furthermore, the supporters of this theory hold that the development of Tutsi dominance that had started in the late pre-colonial

⁷⁹ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.925

⁸⁰ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.925

period was accelerated in the colonial period. The colonists transformed the inhabitants' group identity by introducing Western ideas and ideology regarding race and discrimination based on ethnicity. This led to increased focus and consciousness regarding identity. The interpretations ultimately influenced how Rwandans saw themselves and understood their group identity.⁸¹

Others have again claimed that the Tutsi are descendants of Nilotic herders, whereas the Hutu are believed to be of "Bantu" origin from south and central Africa.⁸² However, this is not indisputable and there are several theories regarding especially the origin of the Tutsi. For example it has been claimed that the Tutsi originated from Ethiopia, while the researcher Christophe Mfizi in *Les lignes de faite du Rwanda independent* argues that the Tutsi are descendants of Semitic people who migrated from Saudi Arabia. Another researcher, Paul del Perugia in *Les derniers rois mages* claims that the origin of the Tutsi is the Pharaohs of ancient Egypt.⁸³ However, it has also been claimed that as people married within the occupational group they belonged to (The Hutu were normally cultivators, while the Tutsi were pastoralists), a shared gene pool was created and thus made the two groups reinforce and carry on the physical differences.⁸⁴

4.2 Recent history

4.2.1 Introduction

Rwanda was colonized by Germany from 1897 and Belgium from 1917. The colonizers relied on the elite group which mainly consisted of people referring to themselves as

⁸¹ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.925-926

⁸² See William A. Schabas; *Genocide in International Law*, 2000

⁸³ Alexandre Kimenyi ; *Trivialization of Genocide: The Case of Rwanda*, in *Anatomy of genocide. State Sponsored Mass Killings in the Twentieth Century*, edited by Alexandre Kimenyi and Otis L. Scott, p.440

⁸⁴ Cf. Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report, (History p.4)

Tutsi. In the beginning of the 1930s Belgian authorities established a system of identity cards based on what the Belgians considered as three distinct ethnic groups: Hutu, Tutsi and Twa. It became mandatory to carry this card.⁸⁵ The system with identity cards was maintained until 1994. In addition to the system of identity cards, the Belgian colonial administration decided that one's identity followed the identity of one's father. This effectively eliminated the earlier fluid nature of ethnic identities.⁸⁶ It has been claimed that by giving the Tutsi group power and positions and making them the superior group, the colonizers thus arranged for a future conflict. In the view of the colonizers, the Tutsi looked more European with their height and light colour and therefore automatically more intelligent and more able to govern. Alison Desforges writes: “*Unclear whether these were races, tribes, or language groups, the Europeans were nonetheless certain that the Tutsi were superior to the Hutu and the Hutu superior to the Twa – just as they knew themselves superior to all three*”.⁸⁷

Regarding the physical differences between Hutu, Tutsi and Twa, it is clear that the Twa people (about 1% of the population) always has differentiated from the Hutu and Tutsi. First, they are physically distinguishable by such features as their smaller size and secondly they also used to speak a distinctive form of Kinyarwanda.⁸⁸

The “typical” Tutsi would be tall, slender and narrow-featured, while the Hutu will be shorter and with broader features. Those features are visible in some, but not in many others. Especially after the increase of mixed marriages in the recent decades, it has

⁸⁵ Cf. Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report cf. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 2 September 1998

⁸⁶ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.925-926

⁸⁷ Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report, (History,p.4)

⁸⁸ Alison Des Forges; *No One to Tell the Story*, Human Rights Watch Report, (History,p.2)

become more difficult to know a person's group affiliation simply by looking at the person.

The theory on ancient ethnic hatred has been widely criticised. It is often claimed that the Tutsi and Hutu "labels" initially only was a question of social status. The fact that intermarriage was very common and that the two groups lived peacefully as neighbours, there were no Hutuland or Tutsiland, has been used as arguments for there being no ancient deep rooted ethnic conflict between the two groups. Furthermore, it has been pointed out that Rwanda was a stable country where people were dispersed on thousands of hills.⁸⁹

4.2.2 The Hutu revolution

The Tutsi were favoured by the Belgian colonizers in terms of education, positions in public life and government services. Occupational and educational opportunities were reserved for the Tutsi. However, the Hutu population became increasingly impoverished and embittered. Then, as the Belgians were under pressure from the UN, gradually the Hutu to a certain extent were allowed to participate in public life. In 1956 free elections were held and the Hutu obtained a clear majority. A confrontation between the two groups became inevitable and in 1959 political unrest broke out. After a period of violence it ended in October 1960 with the establishment of an autonomous provisional Government headed by the Hutu grass root party; MDR Parmehutu. The Tutsi monarch fled and Rwanda became a republic in 1961. The following year independence was declared. Events from 1959 to 1962 have later been described as ethnic cleansings. Massacres of Tutsi took place and Tutsi in the northern part of Rwanda, in Ruhengeri and Gisenyi, were removed from their homes, their houses were burnt and their cattle

⁸⁹ Alexandre Kimenyi ; *Trivialization of Genocide: The Case of Rwanda*, in *Anatomy of genocide. State Sponsored Mass Killings in the Twentieth Century*, edited by Alexandre Kimenyi and Otis L. Scott, p.434

slaughtered. They were then resettled in less attractive areas in Bugeresera and Sake in Kibungo.⁹⁰ These events led to the rapid departure of Tutsis to exile in neighbouring countries (e.g. Uganda). During the 1960s some of these refugees made several attempts to attack Rwanda. After the attacks severe reprisals aimed at Tutsis still living in Rwanda were carried out. It is estimated that about 20.000 Tutsi were killed and more than 300.000 fled abroad in this period.⁹¹ The Hutu revolution is of major significance in order to understand the genocide following more than 30 years later. Some theories claim that there is often a close relation between revolution and genocide. The American genocide scholar Robert Melson argues for such a theory and states: *“Some revolutions may lead to genocide because all revolutions redefine and recast the political community, and in the process they exclude certain communal groups and classes. It is this exclusion that becomes the necessary condition for genocide, and in that sense revolutions, especially those that lead to war, can provide the circumstances under which necessary conditions for genocide are established.”*⁹²

After the Hutu revolution, the Tutsi were excluded from the political community and important posts in the country. Furthermore, the identification of the Tutsi as enemies both within Rwanda and abroad, made them an ideal target. In a country where the Tutsi traditionally were on top of the social pyramid, while the Hutu were of lower class, Rwanda was very susceptible to revolution. Another aspect is that the Tutsi population in Rwanda was seen as potential allies of the Tutsi-led Rwanda Patriotic Front (RPF) which was based in Uganda.

⁹⁰ *Trivialization of Genocide: The Case of Rwanda*, Alexandre Kimenyi in *Anatomy of genocide. State Sponsored Mass Killings in the Twentieth Century*, edited by Alexandre Kimenyi and Otis L. Scott, p.430

⁹¹ Cf. Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report, (History p.6)

⁹² Melson, Robert; *Revolution and Genocide: On the origins of the Armenian Genocide and the Holocaust*, p.28. (1992)

For several years the southern-based MDR Parmehutu leaders neglected Hutu from the north and in 1973 this split was clear and the disagreements within the regime resulted in anarchy. In July 1973, General Juvénal Habyarimana took power through a coup, established a second republic and in 1975 made Rwanda a single-party state under the *Mouvement révolutionnaire national pour le développement* (MRND).⁹³

4.2.3 The Habyarimana period

Initially, many Tutsi were positive to Habyarimana and were prepared to reach a compromise. However, gradually, Habyarimana's politics became clearly anti-Tutsi and the Tutsi was widely discriminated, for instance by applying quota systems in universities and government services. Thus, after a promising start of the Habyarimana period, the situation in Rwanda deteriorated. A policy of systematic discrimination was pursued even among the Hutu (in the favour of Hutu people from Habyarimana's native regions; Ruhengeri and Gisenyi). It has been underlined how this discrimination against the Hutu seriously weakened Habyarimana and how it led to opposition and internal unrest amongst the Hutu. In addition, president Habyarimana was confronted with a dramatic economic decline and foreign donors were demanding political reforms. Thus, Habyarimana had to accept the multi-party system in principle. The new constitution introducing the multi-party system was adopted in June 1991.⁹⁴

4.2.4 The attack on 1 October 1990

In 1990 the number of Rwandans in exile was approximately 600.000. Amongst those were the members of the RPF (Rwandan Patriotic Front), who had decided to return

⁹³ See Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report, p.6 cf. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 2 September 1998

⁹⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 2 September 1998, p.25 cf. *Leave No One to Tell the Story*, Alison Des Forges, Human Rights Watch Report, p.10

home to Rwanda by their own means. The RPF did not want only the return of the refugees, but also another and more democratic government.

On 1 October 1990 the RPA (the fighting force of the RPF) crossed the boarder from western Uganda with Paul Kagame in command.⁹⁵ The Tutsi refugee warriors had massive military and logistical support from Uganda.⁹⁶ For President Habyarimana, the attack was an opportunity to rebuild the power he was about to lose by uniting Rwanda against the enemy. However, he understood that it was a risk as well. The attack might embolden the opposition of Rwanda and lead them into alliance with the enemy. Furthermore the invasion represented a serious threat to the restoring of the dignity of the Hutu masses after the 1959-62 revolution. In addition, it made the resident Tutsi population potential enemies as the prospect of another period of Tutsi domination suddenly became more likely. Moreover, the invasion unleashed the rage of scores of Hutu politicians against Tutsi communities as well as strengthening the Hutu solidarity.

The 1 October RPF attack was easily quelled by Habyarimana troops, with the support of Zaire, Belgium and France. However, Habyarimana used the invasion to retake the political lead (cf. above). On 4 October 1994, the Habyarimana regime launched a fake attack on Kigali. It was supposed to be understood as an RPF attack. The bogus attack was used in order to justify the arrest of hundreds of Tutsi and moderate Hutu under the accusation of they being accomplices of the RPF.⁹⁷

⁹⁵ Alison Des Forges; *Leave No One to Tell the Story*, Human Rights Watch Report, p.11

⁹⁶ Renè Lemarchand; *Comparing the Killing Fields: Rwanda, Cambodia and Bosnia*, p.153. I: *Genocide, Comparisons and Contemporary Debates*. Danish Genocide Studies Series 2, 2003, Edited by Mette B. Jensen and Steven L. B. Jensen

⁹⁷ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.926

This new atmosphere served to worsen the atmosphere of ethnic tensions in the country and lead to recurrent cycles of genocidal massacres against the Tutsi (against the Bagogwe, a Tutsi subgroup and the Bugesera Tutsi in March 1992).⁹⁸

Over the next years, Habyarimana used a two-pronged strategy to keep the political control. First, they appeased critics by entering negotiations with the RPF. There were also made political concessions; as political reforms (e.g. legalizing opposition parties). However, on the other hand, the Habyarimana regime actively undermined these concessions by for example denying the opposition any real power. In this period the country faced economic decline, increased unemployment and growing violence. During this period, Habyarimana's supporters increased their coercive power through a massive expansion of the Rwandan Armed Forces (the FAR).⁹⁹ In 1993 it is supposed that a powerful circle of Hutu (known as *akazu*) close to Habyarimana, planned how to eliminate both Tutsi and moderate Hutu in order to regain broad political control via large-scale massacres. The *akazu*, which mainly consisted of Hutu from Habyarimana's home region Ruhengeri and Gisenyi, felt increasingly threatened by political reforms and the ongoing negotiations with RPF.

In August 1993 the Rwandan Government and the RPF signed the final Arusha Accords, the final power-sharing peace agreement between the Habyarimana regime and the RPF. The agreement was widely perceived in Rwanda as having ceded too much to the RPF and having solidified the division of political parties into pro- and anti-Arusha Accords wings. The anti-Arusha Accords wing joined Habyarimana's MRND

⁹⁸ Renè Lemarchand; *Comparing the Killing Fields: Rwanda, Cambodia and Bosnia*, p.153. I: *Genocide, Comparisons and Contemporary Debates*. Danish Genocide Studies Series 2, 2003, Edited by Mette B. Jensen and Steven L. B. Jensen

⁹⁹ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.926

and the extreme anti-Tutsi party, the CDR, in a loose pro-regime coalition. This coalition was named “Hutu Power”. The Hutu Power fraction saw themselves as natural rulers as they constituted Rwanda’s majority and because the Hutu had a long history in Rwanda (as opposed to the Tutsi who had arrived at a later stage to conquer and dominate the country). It was drawn a picture of all Tutsis to be RPF sympathizers and that moderate Hutus, who supported the Arusha Accords or opposed Habyarimana were traitors or secretly Tutsi. The Tèlèvision Libre Mille-Collines was established; a new radio station which broadcasted Hutu Power’s anti-Tutsi, anti-opposition and anti-Arusha Accords propaganda.¹⁰⁰

Burundi’s president was assassinated in October 1993. This event had great impact on neighbouring Rwanda. The Hutu Power movement claimed that the failure of a transition to majority rule in Burundi showed that the Tutsi were not trustworthy. After the assassination, a wave of inter-ethnic violence took place in Burundi and led to a stream of Hutu-refugees into Rwanda. This further tensioned the political climate. At the same time, Rwandan military personnel began to provide paramilitary training for the youth wings of Hutu Power, such as *Intrahamwe* (the MRND’s youth group).¹⁰¹

In the beginning of 1994, political and ethnic tensions continued to increase, and despite the Arusha Accords being implemented, Hutu Power forces sought to scuttle the final transfer of power to a new unity government. Meanwhile, UN forces (the United Nations Assistance Mission to Rwanda – UNAMIR) were stationed in Rwanda to oversee the transition. However, the FAR (the Armed Forces of Rwanda) continued to expand and got arms from France, Egypt and South Africa. In February more political

¹⁰⁰ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.928

¹⁰¹ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.928

assassinations took place and they intensified the atmosphere of crisis in the country. At this time, intelligence reports warned that ethnic and political massacres would inevitably take place in Rwanda. Furthermore the commander of the UNIMAR forces, General Roméo Dallaire, sent a memo to the UN headquarters that he had been informed of the Hutu extremists plan to carry out genocide. None of these warnings were followed up.¹⁰²

4.2.5 6 April 1994

On 6 April 1994, the airplane carrying President Habyarimana and the president of Burundi, Cyprien Ntaryamira, was shot down by surface-to-air missiles as it prepared to land at Kigali. All onboard died in the crash. Still today it is not clear who was responsible for the attack. The shooting down seemed like a signal. Immediately after the plane crash, military and militia groups began rounding up Tutsi as well as moderate Hutu and started killings and massacres. The genocide had begun. The killings started in Kigali, but soon spread to all corners of Rwanda. Between 6 April and the beginning of June about 800.000 people were killed in what emerged as one of history's most effective genocides.

5. LEGAL ANALYSIS

5.1 Introduction

In this chapter I will discuss the case law of the ICTR (and some ICTY case law, cf. 5.4.1) regarding the definition and scope of the protected groups. As mentioned in the introduction, the analysis will mainly focus on “ethnic group” as this is the central protected group in the ICTR jurisprudence.

¹⁰² Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.928-929

I will seek to identify which factors made the ICTR identifying the Tutsi as an ethnic group and which factors that the Tribunal did not find determining. Furthermore, I will analyse the case law of the ICTR in order to establish the scope of the protected groups and how the Tribunal has developed the law at this point. Thus, I will try to find some general elements which are relevant for the interpretation of the protected groups.

Rwanda is a clear example of how complicated the application of the four concepts of the protected groups can be. In Rwanda's case, the identification of a protected group has been a major issue in the aftermaths of 1994.¹⁰³

5.2 Analysis of relevant cases in the ICTR case law

5.2.1 What is an ethnic group?

The question is which distinguishing characteristics that have to be present in order to define one group as ethnic. In this respect, when analysing the ICTR case law, the starting point will be the *Akayesu-case*, as this is the ICTR's first judgement and thus made precedence.

In the *Akayesu-case* the ICTR Trial Chamber found the question of whether the Tutsi constituted an ethnic group complicated. As a starting point, the Trial Chamber defined an ethnic group as "*a group whose members share a common language or culture.*"¹⁰⁴ As the Tutsi had the same language, religion and by far the same culture as the Hutu, it was not evident that the Tutsi in fact was a separate ethnic group. Furthermore, the Trial Chamber in the *Akayesu-case* defined national groups as "*a collection of people who*

¹⁰³ Cf. *International Criminal Law*, Antonio Cassese, Oxford University Press, 2003, p.101

¹⁰⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.512

are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”¹⁰⁵ and a religious group as “*one whose members share the same religion, denomination or mode of worship.*” The Tribunal found that ethnic came closest despite there being few meaningful ways of distinguishing in terms of language and culture from the Hutu.¹⁰⁶

In the *Kayishema and Ruzindana*-case the Trial Chamber stated that “*an ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).*”¹⁰⁷

Characteristics like language, religion and culture would be easily recognised. When those characteristics were not present, i.e when it was not possible to point out a group based on these specific characteristics, the ICTR had to investigate and discuss whether there were other means of identifying the Tutsi as a protected group.

The Trial Chamber in the *Akayesu*-case acknowledged the fact that the Tutsi population did not have “*its own language or a distinct culture from the rest of the Rwanda population.*”¹⁰⁸ However, the ICTR Trial Chamber found that a number of objective factors indicated that the Tutsi nevertheless was an ethnic group. The Trial Chamber concluded on the basis of witness testimony and official classifications that the “*the Tutsi constituted a group referred to as ethnic*” and furthermore it found that the Tutsi did “*constitute a stable and permanent group and were identified as such by all.*”¹⁰⁹

¹⁰⁵ *Ibid*, para.512

¹⁰⁶ William A. Schabas; *Genocide in International Law*, p.131

¹⁰⁷ See *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para.98

¹⁰⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.170

¹⁰⁹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.702

In the following I will look at the factors which the Trial Chamber in *Akayesu* used in order to define the Tutsi as an ethnic group.

5.2.2 The factors – establishing the Tutsi as a protected group

5.2.2.1 Identity cards and official classifications

Based on, amongst other factors, the existence of government-issued official identity cards describing them as such, the Trial Chamber held that the Tutsi were an ethnic group. The Trial Chamber found that the Tutsi constituted a group which was referred to as “ethnic” in official classifications.¹¹⁰ In the identity cards it was referred to the Kinyarwandan word “*ubwoko*” or the French word “*ethnie*” which means ethnic group. Moreover, the Constitution of Rwanda and the laws in force in 1994 identified all inhabitants of Rwanda by referring to their ethnic group. Art. 57 of the Constitution of the Rwandan Republic of 10 June 1991 provided that every Rwanda should be identified by “*sex, ethnic group, name, residence and domicile*”. Furthermore, the Art. 118 of the Civil Code of 1988 required that birth certificates had to include “*the year, month, date and place of birth, the sex, the ethnic group, the first and the last name of the infant.*”¹¹¹

5.2.2.2 Tutsi separated from Hutu at roadblocks

The ICTR Trial Chamber held that the fact that at roadblocks all over Rwanda after 6 April 1994, the Tutsi were separated from the Hutu and killed,¹¹² does imply that the Tutsi were targeted as an ethnic group. At the roadblocks identity cards, which stated

¹¹⁰ *Ibid*, para.702

¹¹¹ *Ibid*, para.170

¹¹² *Ibid*, para.123

whether the person was Tutsi or Hutu, of every passing person was checked by troops of the Presidential Guard or members of the *Intrahamwe*. After checking the ethnicity on the identity cards, the Tutsi were separated from the Hutu and killed, sometimes on the spot.¹¹³

5.2.2.3 Evidence of propaganda campaign

The Trial Chamber in the *Akayesu*-case found that the propaganda campaign conducted before and during the genocide by the audiovisual and print media, e.g, “Radio Television des Mille Collines”(RTLM) and the Kangura newspaper, supported the identification of the Tutsi as an ethnic group. These different news media encouraged killing of Tutsi who they reckoned as allies of the RPF. The Trial Chamber held that certain newspaper articles and cartoons printed in the Kangura newspaper were “*unambiguous in this respect.*”¹¹⁴

5.2.2.4 Tutsi bodies thrown in the Nile

Witnesses testified in the *Akayesu*-case that Tutsi bodies were systematically thrown into the Nyabarongo river, which is a tributary of the Nile. The US historian Alison Desforges testified that the underlying intention of throwing the bodies into the Nile was to “*send the Tutsi back to their place of origin.*”¹¹⁵ This was done to underline that the Tutsi were foreigners in Rwanda as they were supposed to have originated in the Nilotic areas.¹¹⁶

¹¹³ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.123

¹¹⁴ *Ibid*, para.123

¹¹⁵ *Ibid*, para.120

¹¹⁶ *Ibid*, para.120

5.2.2.5 Self-identification

Furthermore, the Trial Chamber noted that during the *Akayesu-trial* all the Rwandan witnesses spontaneously and without hesitation answered when questioned about their ethnic identity.¹¹⁷ In the Chamber's opinion this showed that the Tutsi did constitute a stable and permanent group which was regarded as such a group by all Rwandans.¹¹⁸

5.2.2.6 General observations and conclusions regarding the decisive factors

The Trial Chamber in *Akayesu* concludes that "*the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. However, the Chamber finds that there are a number of objective indicators of the group as a group with a distinct identity*".¹¹⁹ Thus, despite that the Trial Chamber was fully aware of that the Tutsi did not have a separate language or a distinct culture or met the general definition of an ethnic group, *i.e.* members who speak the same language and/or have the same culture, it reached the conclusion that the Tutsi constituted an ethnic group based on other elements (listed above). In short, the Trial Chamber found the two groups distinctive based on a) the distinction made by the Belgian colonizers by the establishment of a system of identity cards, and b) the distinction was confirmed by the self-perception of the members of each of the groups.

Another thing to be noted is that the Trial Chamber in *Aakayesu* does not focus on physical differences. Cf. *Chapter 4.11* (factual context) where it is held that physical differences between Tutsi and Hutu can be seen in some, however, not possible in

¹¹⁷ *Ibid*, para.702

¹¹⁸ *Ibid*, para.702

¹¹⁹ *Ibid*, para.170

others. Moreover, common distinguishing elements as culture, language and religion was not useable as these were shared by the Hutu and the Tutsi population.

The ICTR's use of the listed factors shows that the Tribunal emphasizes how the protected group is perceived by the perpetrator *together* with some objective elements. Thus the constitution of a protected group has a high degree of subjectivity. The objective criteria are thus supplemented by a subjective standard of perception and self-perception. It seems that the determination a whether a group is a protected group has developed from an objective to a more subjective standard.¹²⁰ Consequently, an objective test establishing distinctive features like language, religion etc is in many cases alone not sufficient.

It has been asked why the ICTR did not find the Tutsi as constituting a racial group. A general discomfort with the use of the "race"-category may explain why they did not opt for that. As earlier explained, the general conception of the Tutsi group within Rwanda is based on hereditary physical features, even though these are often not very obvious in many people. In the *Akayesu-case*¹²¹ the ICTR stated that the conventional definition of a racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.¹²² Moreover, scholars have claimed that "ethnic" as it is employed in the Genocide

¹²⁰ Cf. *Schabas*, p.109 and Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.11

¹²¹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998

¹²² See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, para. 513 and *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 98

Convention Art. II is “larger” than the racial group and refers to a “*community of people bound together by the same customs, the same language and the same race*”¹²³

5.2.2.7 Subsequent ICTR jurisprudence

Later ICTR case law has followed up the *Akayesu*- line regarding the ethnic group-issue. In the *Ntakirutimana-case*,¹²⁴ the ICTR Trial Chamber built their conclusion on whether the Tutsi constituted an ethnic group on the totality of the evidence heard in the case. When discussing whether the accused had the requisite intent to commit genocide, the Chamber held that the Tutsi were an ethnic group.

In the *Kayishema and Ruzindana-case*, the ICTR Trial Chamber concludes that the Tutsi constitutes an ethnic group; “*The victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were ‘members of a group,’ in this case an ethnic group*”¹²⁵

Moreover, in the *Semanza-case*, the ICTR Trial Chamber held that the Tutsi was an ethnic group and took judicial notice of the fact that “*between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa*”. Accordingly, it has been established for the purposes of this case that the Tutsi in Rwanda were an “*ethnic*” group”.¹²⁶

¹²³ Glaser, Stèfan, in Benjamin Whitaker; *Revised and Updated report on the Question of the Prevention and Punishment of the Crime of Genocide*, New York, United Nations (Doc. E/CN.4/Sub.2/1985/6, p.15-16

¹²⁴ *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10 ICTR-96-17-T, Judgement of 21 February 2003, para.789

¹²⁵ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para.291

¹²⁶ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement of 15 May 2003, para.422

5.2.3 The scope of Art. II

5.2.3.1 The “stable and permanent”-theory

The Trial Chamber in the *Akayesu*-case seemed to find the enumeration of protected groups in Art.II of the Convention to be too narrow and opted for an interpretative expansion of Art.II. The Trial Chamber defined a “group” and stated that the provisions on genocide only refer to what they call “stable groups”.¹²⁷

The Trial Chamber further discussed whether groups which are stable and permanent like the four included groups, but still does not meet the definition at any one of the four groups expressly protected by the Convention, also should be included. That is; would it be possible to punish the physical destruction of such a group (e.g none of the four groups listed in Art.II) under the Genocide Convention? In this *obiter dictum* the Trial Chamber held that in a situation where none of the four concepts would fit, it is still possible to extend to certain other groups. However, the Trial Chamber did not elaborate further on which groups that may possibly fall within the scope of the genocide definition.¹²⁸ The Trial Chamber here stressed the particular importance of respecting the intention of the drafters of the Convention and refers to the preparatory work of the Convention. Thus, it appears that any group regardless of whether it is considered as an ethnic, racial, religious or national group in an ordinary accepted understanding of these terms, it may still be come under the protection of the Convention.¹²⁹

¹²⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.511

¹²⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.516, see also *Genocide in International Law*, William A. Schabas, 2000, p.131

¹²⁹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.516

The Trial Chamber refers to the records of the meetings of the Sixth Committee of the General Assembly in 1948¹³⁰ where it, in the Trial Chamber's view, appears that genocide was perceived as targeting only "stable" groups. Further, the Trial Chamber finds that these are groups that are constituted in a permanent fashion and membership which is determined by birth. More mobile groups which can be voluntarily joined (e.g. political and economic groups) were excluded. Thus, the Trial Chamber concludes that a common criterion for all the four protected groups is that membership in such groups is normally not challengeable by its members who automatically by birth belong to it in a "*continuous and often irremediable manner*".¹³¹

In the second major ICTR judgement, the *Kayishema and Ruzindana-case*,¹³² the Trial Chamber (another trial chamber than in the *Akayesu-case*) adopted a different approach to the above discussed issue. The Trial Chamber determines that the Tutsi constitute an ethnic group and apparently, the Trial Chamber failed to support the "stable and permanent"-theory from the *Akayesu-judgement*.¹³³

In the *Musema-judgement* from January 2000 the same Trial Chamber (Trial Chamber 1, in both cases consisting of judges Lennart Aspegren, Navanethem Pillay and Laïty Kama) as in the *Akayesu-judgement* returned to the "stable and permanent"-thesis. Again, the judges refer to the preparatory work of the Genocide Convention¹³⁴ and holds that "*certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "non stable" or "mobile" groups which one joins through individual, voluntary commitment. That would seem to*

¹³⁰ Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly

¹³¹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.511

¹³² *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para

¹³³ See William A. Schabas; *Genocide in International Law*, 2000, p.132

¹³⁴ Cf. Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

suggest a contrario that the Convention was presumably intended to cover relatively stable and permanent groups."¹³⁵

Then the Trial Chamber concludes that when assessing whether a group is protected or not, there has to be carried out on a case-to-case basis taking into account "*the specific political, social and cultural context in which the acts allegedly took place.*"¹³⁶

5.2.3.2 Group membership – an objective or subjective approach

As a solution to the difficulties regarding the interpretation of the four categories in Art. II of the Convention, some scholars have argued for a subjective approach. That implies that if the offender views the group as being national, racial, ethnical or religious then that should suffice. As earlier mentioned, the Trial Chamber in the *Akayesu-judgement* operated with both objective and subjective criteria when establishing whether or not a group of persons was actually a group that was protected by the Convention. Here the Trial Chamber *both* asked how those persons were in fact treated and how they saw themselves. However, the idea of a subjective element regarding group membership was not invented at the ICTR. In 1990, Frank Chalk and Kurt Jonassohn defined genocide as "*a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.*"¹³⁷

Another, and clearer, case law example of this view can be found in the *Kayishema and Ruzindana- case*.¹³⁸ In this case the ICTR adopted a purely subjective approach, and

¹³⁵ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement of 27 January 2000, para.160

¹³⁶ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement of 27 January 2000, para.160

¹³⁷ Frank Chalk and Kurt Jonassohn; *The History and Sociology of Genocide: Analyses and Case Studies*, 1990

¹³⁸ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para.98

stated that an ethnic group could be “*a group identified as such by others, including perpetrators of the crimes.*”¹³⁹

The subjective approach was further developed in the *Rutaganda-case*.¹⁴⁰ Here the ICTR Trial Chamber chose a clear subjective approach. The Trial Chamber first states that the concepts of the four protected groups in Art. II have been widely researched and that, at the time of the judgement, were “*no generally and internationally accepted precise definitions thereof.*”¹⁴¹ The Trial Chamber proceeds with underlining that such a definition of the concepts must be assessed in the light of the particular political, social and cultural context. Then the Trial Chamber concludes that for the purposes of applying the Genocide Convention, membership of a group is in fact a subjective rather than an objective concept. The Trial Chamber states moreover that the victim is perceived by the perpetrator as a member of a protected group. In some instances, the victim may perceive himself/herself as belonging to the protected group.

In the *Musema-case*, the ICTR Trial Chamber noted that the concepts of national, ethnical, racial and religious groups have been researched extensively and, at present, there exist no generally and internationally accepted precise definitions. Furthermore, it was concluded that each of the concepts “*must be assessed in the light of a particular political, social and cultural context.*”¹⁴² Then the Trial Chamber states that regarding the application of the Genocide Convention, the membership of a group is, in essence, rather subjective, rather than objective concept. The Trial Chamber points out that the perpetrator perceives the victim as belonging to a certain group that is to be destructed.

¹³⁹ See William A. Schabas; *Genocide in International Law*, 2000, p.110

¹⁴⁰ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement of 6 December 1999. *Georges Rutaganda* was a businessman & 2nd V.P. of Interahamwe. He was found guilty of genocide and crimes against humanity. He was sentenced to life imprisonment and his appeal was dismissed on 26 May 2003.

¹⁴¹ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement of 6 December 1999, para.56

¹⁴² *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement of 27 January 2000, para.163

In some cases, the Trial Chamber states, the victim will consider himself to be a member of the specific group. Then the Trial Chamber continues by concluding that a subjective definition is alone not sufficient to determine a victim group, and the judges refer to the preparatory work of the Genocide Convention,¹⁴³ pointing out the distinction between stable and non-stable (mobile) groups.¹⁴⁴ Furthermore, it states that “*therefore, the Chamber holds that in assessing whether a particular group may be considered protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.*”

In the *Semanza- case*¹⁴⁵, the ICTR Trial Chamber first states that the ICTR Statute does not give any information regarding whether the targeted group is to be determined by objective or subjective criteria or by what they call “*some hybrid formulation*”.¹⁴⁶ Then the Trial Chamber proceeds by pointing out that the ICTR Trial Chambers have found that the determination of whether a group is within the scope of Art. 2 of the Statute should be assessed on a case-by-case basis; “*by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators*”¹⁴⁷. Thus, the Chamber concludes that the determination of a protected group must be made on a case-by-case basis, where both objective and subjective criteria are considered.

¹⁴³ *Summary Records of the meetings of the Sixth Committee of the General Assembly*, 21 September - 10 December 1948, Official Records of the General Assembly.

¹⁴⁴ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement of 27 January 2000. *Alfred Musema*, Director of a Tea Factory in Gisovu. The ICTR found him guilty of genocide and crimes against humanity and sentenced him to life imprisonment. His appeal was dismissed on 16 November 2001 and he now serves his sentence in Mali.

¹⁴⁵ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement of 15 May 2003. *Laurent Semanza*, the Bourgmestre of Bicumbi, was by the ICTR found guilty of genocide and crimes against humanity. He got a 25 years sentence. His case is currently on appeal.

¹⁴⁶ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement of 15 May 2003, para.317

¹⁴⁷ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement of 15 May 2003, para.317

In the *Bagilishema-case*¹⁴⁸, where the accused was acquitted, the Trial Chamber first noted that the concepts of national, ethnical, racial, and religious groups does not have any generally or internationally accepted definition (cf. the above mentioned *Semanza-case*). Therefore, the Chamber concludes that each concept must be assessed in the actual political, historical, social and cultural context. The Chamber further recognizes that in the assessment both the subjective and objective dimension is central; “A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.”¹⁴⁹

In a recent judgement, the *Ndindabahizi-case*, the Trial Chamber refers to the *Bagilishema-judgement*, and the above quotation when it assesses the question of whether a person belonged to a protected group. It concludes that the subjective intentions of the perpetrators are of “primary importance.”¹⁵⁰

5.3 Discussion

5.3.1 Criticism of the “stable and permanent”-theory

The “stable and permanent”-theory has been criticized and widely debated. It has been claimed that this proposition is unconvincing regarding the fact that the drafters of the

¹⁴⁸ *Prosecutor v. Bagilishema*, Case No. ICTR-95-IA-T, Judgement of 7 June 2001

¹⁴⁹ *Prosecutor v. Bagilishema*, Case No. ICTR-95-IA-T, Judgement of 7 June 2001, para.65

¹⁵⁰ *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Judgement of 15 July 2004, para.468

Convention clearly expressed the intention to protect the groups set out in Art. II.¹⁵¹ If the Genocide Convention framers actually meant to include all “stable and permanent” groups why did they not simply say that? Further, it has been pointed out that the Trial Chambers’ way of using the Convention’s preparatory work is actually wrong. The preparatory work may clarify unclear and ambiguous terms or terms which are absurd or unreasonable.¹⁵² On the other hand, it is not the purpose to add elements that were actually left out at the preparatory stage. Moreover, including terms that are not already present in the legal text, is particularly dubious when it regards treaties/legal texts that define criminal offences. In the field of criminal law, the interpretation is normally supposed to be restrictive in order to avoid conflict with the fundamental principle *nullum crimen sine lege*.¹⁵³ It has been claimed that if the hypothesis based on the principle of “stable and permanent” is to be sustained, it must rely on the actual wording of Art.II.¹⁵⁴

Moreover, it has been pointed out that three of the four groups included in Art.II are in fact neither stable nor permanent. It has been claimed that only racial groups are actually relatively stable as they are defined genetically. It is a human right to change both nation and religion.¹⁵⁵ Further, people belonging to different ethnic groups are normally able to assimilate into another ethnic group through marriage or acculturation (see above). Changes in nationalities are not unusual either; borders are changed and nations dissolve.¹⁵⁶

¹⁵¹ Cf. *International Criminal Law*, Antonio Cassese, 2003, p.101

¹⁵² See the *Vienna Convention on the Law of Treaties*, (1979) 1155 UNTS 331, art.32

¹⁵³ William A. Schabas; *Genocide in International Law*, 2000, p.132 cf. *Prosecutor v. Delalic et al, Case No. IT -96-21-T, Judgement 16 November 1998, para.166*

¹⁵⁴ William A. Schabas; *Genocide in International Law*, 2000, p.133

¹⁵⁵ Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, arts.15(1) and 18

¹⁵⁶ William A. Schabas; *Genocide in International Law*, 2000, p.133

Scholars have also claimed that the Genocide Convention's preparatory work actually does not clearly show that the aim was to, in ICTR's words: "*patently to ensure the protection of any stable and permanent group*"¹⁵⁷. They stress the fact that the principle of "stable and permanent" groups was only referred to a few times during the drafting and that other alternatives were discussed as well.¹⁵⁸ Another point is that political groups, groups which are in themselves unstable, was initially included amongst the protected groups, but removed in the last minute. This might show that the drafters of the Genocide Convention were perhaps in fact not very clear and steady regarding "stable and permanent groups".¹⁵⁹

In my view, the "stable and permanent"-theory introduced in the *Akayesu*-case, is both broadening and narrowing at the same time. Broadening, in the sense that the Trial Chamber found other means of including groups of human beings as a protected group despite it was found not being included in one of the four protected groups in Art. II. This was done by referring to the preparatory work and concluding that there still was hope if the group could be classified as "stable and permanent". On the other hand, I find the theory narrowing, in the sense that in fact very few groups are completely stable and permanent. And how practical is it to determine stability and permanency? Perhaps could the Chamber in *Akayesu* have followed the advice of Judges Guerrero, McNair and Mo who in their advisory opinion¹⁶⁰ argued for a generous and flexible interpretation in genocide-cases. The use of this approach in the interpretation of human rights-law (cf. above), may support this view (see more on this issue under paragraph 5.4).

¹⁵⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.516

¹⁵⁸ William A. Schabas; *Genocide in International Law*, 2000, p.133, cf. UN Doc.A/C.6/SR.69

¹⁵⁹ William A. Schabas; *Genocide in International Law*, 2000, p.133

¹⁶⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, International Court of Justice, 28 May 1951, p.30

Finally, it has been argued that the “stable and permanent”-theory has not been supported when the crime of genocide has been introduced in national penal codes. This lack of support in national legislation may imply that the hypothesis of “stable and permanent” groups is not universally accepted. As states have used other variants of the definition of genocide in the Genocide Convention, no one has, so far, opted for the “stable and permanent” approach.¹⁶¹

5.3.2 Views on interpretation

One question which can be asked is whether the Tribunal’s reliance on the preparatory work of the Genocide Convention will freeze the interpretation of the Convention and thus preventing it from a natural development. Critically, one can ask what value the debates of 1947 and 1948 actually have. It is often argued that the interpretation of international rules is based on the principle of effectiveness (*ut res magis valeat quam pereat*). The principle implies that such rules are to be given maximum effect. Thus, as genocide is perhaps the gravest international crime, it is argued that rules concerning genocide must be construed in such a manner as to give them maximum legal effect.¹⁶²

Human Rights Tribunals do in many cases have a dynamic approach to interpretation due to the special character of human rights law. For instance, it is a principle of a dynamic and evolutive interpretation of the European Convention on Human Rights¹⁶³ due to this convention’s goal to give an effective protection of the fundamental human rights. The aim has allowed this convention to develop in the light of present day

¹⁶¹ William A. Schabas; *Genocide in International Law*, 2000, p.133

¹⁶² Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.6. Available at www.ohchr.org/english/darfur.htm

¹⁶³ Rome, 4 XI, 1950

conditions as “*a living instrument.*”¹⁶⁴ Supporting this view, judge Alvarez in a dissenting judgement in the advisory opinion of the International Court of Justice¹⁶⁵ warned of the dangers of excessive reference to the preparatory work of the the Genocide Convention. He argued that conventions like the Genocide Convention have “*acquired a life of their own*”. Further, he stated that “*They can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the past, and only with regard to the future*”.¹⁶⁶

The principle of dynamic interpretation of the European Convention on Human Rights may be transferred to the Genocide Convention, as both conventions are supposed to protect vital human interests. Because of the Genocide Convention’s nature as a human rights or humanitarian law treaty, other principles of interpretation are also said to apply to the Genocide Convention. In a joint dissenting opinion in the above mentioned advisory opinion of the International Court of Justice¹⁶⁷, Judges Guerrero, McNair and Mo stated that “*The enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation.*”¹⁶⁸

On the other hand, a “*generous*” interpretation may not be suitable in criminal law. In the area of international criminal law there is a principle of individual criminal responsibility. The principle of a flexible and “*generous*” interpretation may come in conflict with other major and fundamental principles. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world’s major criminal justice

¹⁶⁴ *Tyrer v. UK*, The European Court of Human Rights, A 26 (1978) cf. Erik Møse, *Menneskerettigheter*, Cappelen Akademisk Forlag, 2002, pp.101-102

¹⁶⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, International Court of Justice, 28 May 1951. The text is available at <http://teaching.law.cornell.edu/faculty/drwcasebook/docs/genocide%20convention%20decision.pdf>

¹⁶⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, International Court of Justice, 28 May 1951, p.30. See footnote 122 for web address.

¹⁶⁷ See footnote 122

¹⁶⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, International Court of Justice, 28 May 1951, p.26

systems as being fundamental principles of criminality. Another basic principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions.

When it is a question of state responsibility, it is much less disputable to apply a “generous” interpretation. (cf. the cases of the ICJ). Thus, in the field of criminal law with individual responsibility, one has to be more careful regarding a wide interpretation despite the graveness and enormity of the crime. These different values have to be weighed against each other.

5.3.3 Criticism of the subjective approach

The subjective interpretation has its weaknesses. It is problematic to define as genocide acts against a group that might not have a real objective existence. A consequence of this approach may be that a group is identified as a certain group on wrong assumptions. In general, the law cannot permit that the crime is defined by the offender alone. Consequently, it is necessary to establish some objective existence of the four groups.¹⁶⁹ As above mentioned there is thus a mixture of both objective and subjective criteria.

Furthermore it is argued that there are several references to the term “group” in Art. II of the Convention. The term is used in both the chapeau where the subjective element (the *mens rea*) of the crime is described, as well as in the five paragraphs which follow. It is pointed out that if the term “groups” had only been mentioned in the chapeau, that would have supported the subjective approach theory as it would then be enough to

¹⁶⁹ See William A. Schabas; *Genocide in International Law*, 2000, p.110

identify genocidal intent in situations where the accused himself believed that such a group actually existed. But this is not the case. The term “group” is used in the following paragraphs and Art. II requires that the acts of genocide are directed against “members of the group” (Art. II a-e).¹⁷⁰

5.4 Later developments

5.4.1 ICTY Jurisprudence

5.4.1.1 The “stable and permanent”-theory

The “stable and permant”-theory regarding the protected groups introduced in the *Akayesu-case* is supported by the ICTY in the *Jelusic-case*.¹⁷¹ The ICTY Trial Chamber states that the preparatory work of the Genocide Convention shows that there was a desire to limit the field of application of the Convention to protecting “stable” groups. The groups should be defined objectively and the members of the group belonged to it automatically and regardless of their own desires.¹⁷²

5.4.1.2 Subjective approach

The subjective approach regarding the establishment of a protected group as set out in the *Akayesu-case* and followed up in the later ICTR jurisprudence, is used in the *Jelusic-case* and the *Krstic-case*.¹⁷³

¹⁷⁰ William A. Schabas; *Genocide in International Law*, 2000, p.110-111

¹⁷¹ *Prosecutor v. Jelusic*, Case No..IT-95-10-T, Judgement 14 December 1999. Goran Jelusic, an acting commander of Luka prison camp in the former Yugoslavia, was found guilty on war crimes and crimes against humanity. The Appeals Chamber affirmed the Trial Chamber’s sentence of 40 years imprisonment

¹⁷² *Prosecutor v. Jelusic*, Case No..IT-95-10-T, Judgement 14 December 1999, para.69

¹⁷³ *Prosecutor v. Krstic*, Case No. ICTY-T-98-33, Judgement of 2 August 2001.

In the *Jelusic-case*, the Trial Chamber, when seeking to define a religious group¹⁷⁴, states that despite that the objective determination of a protected group is still possible, they find it more “*appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single out that group from the rest of the community*”¹⁷⁵. Furthermore the ICTY Trial Chamber states that it elects a subjective criterion when evaluating whether there exists membership in a national, ethnical or racial group. The Trial Chamber argues that the *stigmatisation* of a group as a distinct national, ethnical or racial by the community is the essential and that this stigmatisation allows the group to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the perpetrator. Then the Trial Chamber concludes that a protected group can be stigmatised by positive or negative criteria. A “positive approach” does consist of the perpetrator “*distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group*”¹⁷⁶. A negative approach implies identifying individuals as not being part of a group to which the perpetrators consider that they themselves belong to and which to them displays certain national, ethnical, racial or religious characteristics. Thus, all individuals would then make up a distinct group by means of exclusion.¹⁷⁷

In the *Krstic-case*, the ICTY Trial Chamber first holds that the Genocide Convention does not protect all types of human groups. It is only to be applied on national, ethnical, racial or religious groups.¹⁷⁸ Furthermore, the Trial Chamber states that none of these

¹⁷⁴ In the ICTY-cases, defining of a *religious* group has been the main issue as opposed to the ICTR where the definition of an *ethnic* group has been the main challenge

¹⁷⁵ *Prosecutor v. Jelusic*, Case No..IT-95-10-T, Judgement of 14 December 1999, para.70

¹⁷⁶ *Prosecutor v. Jelusic*, Case No..IT-95-10-T, Judgement 14 December 1999, para.71

¹⁷⁷ *Prosecutor v. Jelusic*, Case No..IT-95-10-T, Judgement 14 December 1999, para.71

¹⁷⁸ *Prosecutor v. Krstic*, Case No. ICTY-T-98-33, Judgement of 2 August 2001, para.478

groups are clearly defined, neither in the Convention or elsewhere, and then refers to the Convention's preparatory work and the work conducted by international bodies in relation to the protection of minorities which, in the Trial Chamber's view, implies that the concepts of protected groups and national minorities overlap and are sometimes synonymous. The Trial Chamber refers to European instruments on human rights which use the term "national minorities"¹⁷⁹, while universal human rights instruments more often refer to "ethnic, religious or linguistic minorities"¹⁸⁰ and concludes that the two different expressions seem to embrace the same goals. The Trial Chamber then goes to a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, where F. Capotorti stated that "*the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word 'racial' by the word 'ethnic' in all references to minority groups described by their ethnic origin.*"¹⁸¹ The Trial Chamber goes on by referring to the International Convention on the Elimination of All Forms of Racial Discrimination which defines racial discrimination as "*any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.*"¹⁸² The Trial Chamber then goes back to the Genocide Convention's preparatory work which reveals that the term "ethnic" was actually added at a later stage to improve the definition of the type of protected groups in the Genocide Convention and ensuring that the term "national" would not be interpreted as including purely political groups.¹⁸³ Furthermore,

¹⁷⁹ Cf. Art. 14 of the European Convention on Human Rights: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as [...] association with a national minority [...]"

¹⁸⁰ Cf. Art. 27 of the International Covenant on Civil and Political Rights: "In those States in which *ethnic, religious or linguistic minorities* exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"

¹⁸¹ Cf. *Prosecutor v. Krstic*, Case No. ICTY-T-98-33, Judgement of 2 August 2001, para.555 and F. Capotorti, *Study on the Rights of the Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), para.197, referring to the debates held on a draft resolution on the definition of minorities (E/CN. 4/Sub. 2/103)

¹⁸² UNTS, vol. 660, no. 9646, Art.1

¹⁸³ See UN Doc. A/C.6/SR.73

the Trial Chamber argues that the preparatory work shows that making a list of protected groups was aimed more at describing a single phenomenon and approximately refer to what was recognised as “national minorities” rather than referring to several distinct prototypes of groups of individuals. Thus, the Trial Chamber concludes that using a scientifically objective criteria to differ each of the protected groups would be inconsistent with the object and purpose of the Genocide Convention. In addition, the Trial Chamber states; when identifying a group’s cultural, religious, ethnical or national characteristics, the identification has to be done “*within the socio-historic context which it inhabits*”.¹⁸⁴

5.4.2 The UN Report on Darfur

In a recent report of 25 January 2005 of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, (hereafter the “Commission”)¹⁸⁵ the question of protected groups was discussed. The Commission’s¹⁸⁶ mandate was to establish whether it had taken place genocide in Darfur (Sudan).¹⁸⁷

The Commission refers extensively to the jurisprudence of the ICTR in the report. It first states that the Rwandan genocide in 1994 revealed the limitations on the international rules on the area of genocide. Furthermore the report holds that this lack of useable rules/provisions, obliged the judges of the ICTR “*place an innovative*

¹⁸⁴ *Prosecutor v. Krstic*, Case No. ICTY-T-98-33, Judgement of 2 August 2001, para.556-557

¹⁸⁵ Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004

¹⁸⁶ Appointed by the UN Secretary-General IN October 2004. Members: Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott

¹⁸⁷ The Commission found that genocide did not occur in Darfur. The Commission found that some of the objective elements of genocide materialized. However, the Commission found a lack of genocidal intent

interpretation to those rules."¹⁸⁸ Then the report refers to the *Akayesu-case* and the Trial Chamber's use of both objective and subjective criteria for establishing an ethnic group (first, the distinction between the Tutsi and the Hutu made by the Belgian colonizers. Secondly, that this distinction was confirmed by the self-perception of the members of both the Tutsi- and the Hutu-groups). Moreover, the report refers to the objective criterion "stable and permanent group". It states that this criterion "*could be held to be rather questionable.*"¹⁸⁹ However, the report continues that the "stable and permanent" principle was "*supplemented in the ICTR case law (and subsequently in that of the ICTY) by the subjective standard of perception and self-perception as member of a group.*"¹⁹⁰ The report concludes that according to the ICTR and ICTY case law, one should in cases of doubt, establish whether 1) a set of human beings are perceived and in fact treated as belonging to one of the protected groups, and in addition 2) they consider themselves as belonging to one of such groups.¹⁹¹ Here the report refers to the *Kayishema and Ruzindana-*, *Musema and Rutanaganda-cases* from the ICTR and the *Jelusic-* and *Kristic-cases* of the ICTY.

Consequently, the report states;

"...the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that "collective identities and in particular ethnicity, are by their very nature social constructs, "imagined" identities entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts."¹⁹²

¹⁸⁸ Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.10. Available at www.ohchr.org/english/darfur.htm

¹⁸⁹ Ibid, para.10

¹⁹⁰ Ibid, para.10

¹⁹¹ Ibid, para.10

¹⁹² Ibid, para.11

The Commission behind the report considers the ICTR's subjective test to be a *"usefully supplement and develop, or at least elaborate upon the standard laid down in the 1948 Convention and the corresponding customary rules on genocide."*¹⁹³

Furthermore, the report points out that the legal situation prior to the ICTR case law was not satisfactory as the Genocide Convention provisions and customary rules were "either too loose or too rigid", and that they were not able to take account of situations where there was a conflict between two distinct sets of persons, where one part carried out the *actus reus* with the intent to destroy the other group in whole or in part. The Commission moreover stresses the vital importance of the process of a formation of a perception and self-perception of another group as distinct (on the basis of ethnicity, nationality, religion or race). The Commission states that this may start out as a subjective view when regarding the other group as different and as opposed to one's own group. This view gradually crystallizes and hardens into what the Commission describes as a "real and factual opposition" which leads to an objective contrast. Thus, the Commission holds that the subjective becomes objective. Legally, the Commission states that the ICTR's (and ICTY) expansive interpretation regarding the protected groups which includes any "stable and permanent" group which can be differentiated on one of the grounds contemplated by the Genocide Convention and corresponding customary rules is in accordance with the *"object and scope of genocide"*.¹⁹⁴

Furthermore, the Commission holds that the Tribunal's expansive interpretation regarding the protected groups does not substantially depart from the text of the Genocide Convention and the customary rules because *"it too hinges on four categories of groups which, however, are not longer identified only by their objective connotations but also on the basis of the subjective perceptions of the members of groups"*. Then the Commission states that this interpretation has not been challenged by states and thus,

¹⁹³ Ibid, para.12

¹⁹⁴ Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.13

the Commission concludes; *“It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.”*¹⁹⁵

When applying the law on the Darfur-case, the Commission specifically focused on two constitutive elements; i) whether the different tribes that had been the victims of the killings objectively made up a protected group and; ii) whether the perpetrators had genocidal intent. The Commission was in Darfur faced with many of the same challenges as the ICTR regarding the constitution of an ethnic group. The victims had the same language and religion as the perpetrators and due to frequent intermarriage, the groups could hardly be distinguished. The Commission found that the main distinctions between the groups were their respectively sedentary and nomadic character and some difference in their dialects. The Commission then went on to carry out a subjective test; could the groups constitute protected groups, despite not fulfilling the objective elements still constitute a protective group based on a how they perceive themselves and how they are perceived by others. After a consideration/discussion the Commission concludes that in the Darfur-case, the tribes subjectively made up a protected group and that the requirement was fulfilled as such.¹⁹⁶ However, the Commission found that the perpetrators did not have genocidal intent and concluded that genocide had not occurred. Thus, it is to be noted that the Commission here carry out a subjective standard when investigating whether the targeted groups in Darfur was a protected group within the definition of the Genocide Convention.

Regarding the legal value of this report, one must bear in mind that it is a report, not a judgement of a legally constituted court. However, the Commission consists of highly

¹⁹⁵ Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.13

¹⁹⁶ Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.21-24

qualified members (with Antonio Cassese as chairman) and such a report will to some extent give a picture of what the state of law is.

5.5 Conclusions

It is generally agreed that the jurisprudence of the two ad hoc tribunals, the ICTY and the ICTR significantly has contributed and influenced today's understanding of the crime of genocide.¹⁹⁷ As these are the first tribunals where genocide has been thoroughly examined the ICTR and the ICTR has had a unique opportunity, as well as an obligation, to develop the law. Before the ICTR delivered the *Akayesu-case*, the Genocide Convention had been a forgotten and almost antiquated treaty. The ICTR was the first international jurisdiction to pass judgement on the crime of genocide ever since the adoption of the Genocide Convention. Its contribution to the development in the interpretation of the crime of genocide is considered to have built "*a jurisprudence that forms the work of other international criminal tribunals, such as the ICTY, other temporary institutions and in the future the ICC. National courts in a number of countries have relied on the ICTR decisions when these courts have been called on to adjudicate human rights cases*".¹⁹⁸

Thus, the jurisprudence of the ICTR has developed the interpretation of the crime of genocide and has established fundamental precedents in that area of international criminal law for other jurisdictions, including the permanent International Criminal Court. The ICTR (followed up by the ICTY) has used the Genocide Convention of 1948, which many considered out of date and unpractical and applied it on current

¹⁹⁷ Cf. Andreas Zimmermann, *Prosecuting the Crime of Genocide: The Role of National Courts, International Criminal Tribunals and the International Court of Justice*, Mennesker og Rettigheter nr.2, 2003

¹⁹⁸ Dinah L. Shelton (ed. in chief) *Encyclopedia of Genocide and Crimes Against Humanity*, volume 2, p.554

situation. The ICTR interpretation regarding the protected groups has been expansive and the ICTR has contributed widely regarding the issue of the protected groups.

As regards to the protected groups of the Genocide Convention, the ICTR has established the “stable and permanent”-theory. Though it has been discussed and criticised, it has still made precedent and is used by other legal instruments today.¹⁹⁹ Moreover, the development of a subjective standard of perception and self-perception as a supplement to the objective elements has clearly contributed to an increased flexibility in the interpretation of the protected groups. The determination of what constitutes a protected group has thus gradually evolved from an objective to a subjective standard. This development shows the emphasis on that ethnic is in itself a social phenomenon, an “imagined” identity based on changing and often contingent perceptions and not on constant and verifiable social facts. The ICTR’s jurisprudence has thus, still having in mind that some of the innovative interpretations are disputed, contributed to make the Genocide Convention a more flexible instrument as regards to the interpretation of the protected groups.

¹⁹⁹ Report to the UN Secretary General by the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564, 18 September 2004, Section II, para.10

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